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No. 85-567

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida,

Petitioner,

vs.

CARL RAY SONGER,

Respondent.

CORRECTED COPY

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

BRIEF OF PETITIONER ON JURISDICTION

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QUESTIONS PRESENTED

I.

DOES THE EN BANC OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEALS IN THIS CASE, WHICH ADDRESSES THE MERITS OF RESPONDENT'S SECOND FEDERAL HABEAS PETITION WITHOUT ADDRESSING THE SUCCESSIVE PETITION FINDINGS OF THE DISTRICT COURT, IGNORE PRINCIPLES OF FINALITY AND CONFLICT WITH THE GUIDELINES SET FORTH BY THIS COURT IN SANDERS V. UNITED STATES, 373 U.S. 1, 83 S.CT. 1068, 10 L.Ed.2d 148 (1963) AND IN RULE 9(b) OF THE RULES GOVERNING SECTION 2254 CASES?

II.

WHETHER THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS (EN BANC) IN THE INSTANT CASE HOLDING THAT RESPONDENT SHOULD RECEIVE A NEW SENTENCING HEARING BECAUSE THE TRIAL COURT FAILED TO CONSIDER NONSTATUTORY MITIGATING EVIDENCE, WHICH IS BASED ON AND MISCONSTRUES CERTAIN COMMENTS OF THE TRIAL JUDGE, IS IN CONFLICT WITH FAYERWEATHER V. RITCH, 195 U.S. 276, 25 S.Ct. 58 , 49 L.Ed.2d 193 (1904) WHICH PRECLUDES THE USE OF EVIDENCE OF A TRIAL JUDGE'S THOUGHT PROCESS TO IMPEACH A JUDGMENT?

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I.

OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit issued an opinion on August 16, 1985, granting respondent a new sentencing hearing. This opinion appears in the appendix as A 1 - 39. The 11th Circuit panel which heard Songer v. Wainwright, Case No. 85-3064 entered an order on February 5, 1985 staying respondent's execution. This order appears in the appendix as "A 46 - 50". The order and opinion of the district court on the second habeas petition appears as "A 63 - 86". The order and opinion of the Florida Supreme Court on the successive motion under Rule 3.850, Fla.R. Crim.P., appears in the appendix as "A 87 - 93".

The order of the trial court denying

respondent's second 3.850 motion appears in the appendix at A 94 - 112.

II.

JURISDICTIONAL STATEMENT

The Eleventh Circuit Court of Appeals (en banc)(hereinafter called the 11th Circuit) on August 16, 1985 rendered an opinion reversing the district court's denial of relief on respondent's second federal habeas petition. This Court has jurisdiction to hear this cause pursuant to 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Sections 1 and 2 of the Constitution of the United States provide:

> SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The

> Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. §1254 (1) provides:

> Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon a petition of any party

> to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. §2101(c) provides:

> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

IV.

STATEMENT OF THE CASE

On August 16, 1985, the Eleventh Circuit Court of Appeals granted respondent habeas relief on his second habeas corpus petition. The court granted relief based on some post-decision comments made by the trial judge which the 11th Circuit interpreted to mean the trial judge did not consider non-statutory mitigating

evidence. See the court's opinion which appears in the appendix as A 1 - 39.

Respondent was scheduled to be executed at 7:00 a.m. on Tuesday, February 5, 1985. The lower federal court entered a stay of execution on the issue of whether counsel's or the court's understanding of the scope of mitigating evidence which could be presented at a capital sentencing trial operated to violate Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). See Songer v. Wainwright 756 F.2d 800 (11th Cir. 1985).

The death sentence was imposed in this case on February 27, 1974 after Respondent was found guilty of the first degree murder of a highway patrolman. The Florida Supreme Court affirmed the judgment and sentence. Songer v. State, 322 So.2d 481 (Fla. 1975) (Songer I). The

United States Supreme Court vacated the death sentence and remanded for reconsideration in light of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). See Songer v. Florida, 430 U.S. 952 (1977).

On remand it was determined there had been no Gardner violation, and a death sentence was reimposed. In again imposing the death sentence, the trial judge specifically stated he had considered all of the evidence presented at the original sentencing hearing. The Florida Supreme Court on rehearing addressed the Florida death penalty statute in terms of Lockett v. Ohio, supra. See Songer v. State, 365 So.2d 696 (Fla. 1978) (Songer II). Certiorari to this Court was denied. Songer v. Florida, 441 U.S. 956 (1979).

In September, 1980 Respondent's first

death warrant was signed and he filed a motion pursuant to Rule 3.850, Fla. R. Crim. P., alleging a fusillade of issues. That motion included, inter alia, the following issues: (1) The trial court improperly limited the jury's consideration of mitigating circumstances; (2) Defendant received ineffective assistance of counsel at the penalty stage of his trial; (3) The Florida death penalty statute is unconstitutional and denies due process of law on its face and as applied because no standard of proof is required for the overall weighing process in determining whether the death sentence is appropriate. After hearing, the trial court denied relief and the Florida Supreme Court affirmed in Songer III. Songer v. State, 419 So.2d 1044 (Fla. 1982).

A second warrant was signed in November, 1982. Respondent filed a state habeas corpus petition alleging ineffective assistance of appellate counsel. Relief was denied by the court in Songer v. Wainwright, 423 So.2d 355 (Fla. 1982) (Songer IV). A federal habeas corpus petition was filed wherein Respondent raised the same issues being urged in his second habeas petition concerning ineffective assistance of counsel, limitation on mitigating evidence and the jury instructions during the penalty phase.

Another evidentiary hearing was held in the federal district court. Thereafter the district judge entered a lengthy opinion addressing the aspects of Respondent's claims that he now wants to be reconsidered. The district judge denied habeas relief, and the Eleventh Circuit affirmed

that denial. See Songer v. Wainwright, 571 F.Supp. 1384 (M.D. Fla. 1983) and Songer v. Wainwright, 733 F.2d 788 (11th Cir. 1984). A petition for certiorari to this Court on the same issues was denied on January 7, 1985. Songer v. Wainwright, 83 L.Ed.2d 809 (1985).

Respondent's third death warrant was signed on January 10, 1985. A second 3.850 motion was filed in the trial court on January 24, 1985 alleging:

1. Unconstitutional limitation on mitigating evidence.

2. Ineffective assistance of trial counsel.

3. Sentencing charge on mitigating circumstances violated Eighth and Fourteenth Amendments.

4. Instruction on function of the sentencing hearing.

A hearing was held in the Circuit Court of the Fifth Judicial Circuit in and for Citrus County, Florida, Honorable John W. Booth presiding, on January 25, 1985. Songer proffered the testimony of juror Lisa Crews. Trial counsel, C. John Coniglio, collateral counsel, Joseph Jordan, and Songer were permitted to testify. Songer was allowed to amend the motion to allege a fifth ground, to wit: that having been an inmate of death row for eleven years and being on death watch three times constituted cruel and unusual punishment. During the course of the hearing, the trial judge made comments from the bench concerning Florida's death statute in 1974 and how the jury could have interpreted the instructions. (A 254 - 256)

On January 28, 1985, the trial court entered an order indicating the issues had

been previously raised and disposed of in the state and federal courts. The Florida Supreme Court affirmed. Songer v. State, 463 So.2d 229 (Fla. 1985)

On January 31, 1985 a second federal habeas petition was filed in the United States District Court for the Middle District of Florida. The district judge entered an opinion and order on February 2, 1985 denying relief and stating this was a successive petition under Rule 9(b), Rules Governing Section 2254 Cases. Songer v. Wainwright, 605 F.Supp. 686 (M.D. Fla. 1985).

The appeal to the 11th Circuit was assigned to a different three-judge panel from the one which had heard the original habeas petition. The original panel had heard and denied on January 29, 1985, a motion to recall the mandate on the first

appeal and motion to stay execution. Respondent filed an application for a rehearing en banc on the denial of the motion to recall the mandate and for stay of execution. The en banc court indicated the matter of a stay was mooted and action on recall of the mandate was not necessary because of the order entered by the panel on appeal from denial of the second habeas petition. See Songer v. Wainwright, 756 F.2d 799 (11th Cir. 1985).

The panel on the second habeas petition stayed respondent's execution and requested a polling of the en banc court; en banc review was granted on March 20, 1985. Songer v. Wainwright, 756 F.2d 1482 (11th Cir. 1985).

By order dated April 9, 1985, the court decided to hear the original habeas appeal en banc. The original panel

opinion and the panel's order of January 29, 1985 were vacated. Songer v. Wainwright, 758 F.2d 552 (11th Cir. 1985). This original opinion and order were reinstated by the en banc court on August 16, 1985. However, the court reversed the district court's decision denying habeas relief on the second appeal and ordered the district court to issue the writ.

The State seeks certiorari review of the 11th Circuit opinion entered on August 16, 1985 which requires a resentencing of respondent.

BASIS OF FEDERAL JURISDICTION

The basis of federal jurisdiction in the court of first instance was a petition for writ of habeas corpus filed pursuant to 28 U.S.C. §2254.

REASONS FOR GRANTING THE WRIT

A.

THE OPINION BELOW, WHICH CONSIDERS AND REACHES THE MERITS OF RESPONDENT'S SECOND FEDERAL HABEAS PETITION, IGNORES THE DOCTRINES OF FINALITY AND SUCCESSIVE PETITIONS AND CONFLICTS WITH THIS COURT'S DECISION IN SANDERS V. UNITED STATES, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963).

In this case, the 11th Circuit reached the merits of respondent's second habeas petition. The district court denied habeas relief stating the petition was successive under Rule 9(b), Rules Governing Section 2254 Cases. The parties both addressed in their briefs and argued before the court the successive petition issue. Respondent had conceded the legal components and factual basis of his argument on limitation of non-statutory mitigating evidence had been previously presented. Yet, the 11th Circuit in one

sentence ignores the facts before it and says, without explanation, the petition raises different grounds for relief. This action by the court conflicts with the guidelines on successive petitions as set out by this Court in Sanders v. United States, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963).

Rule 9(b) of the Rules Governing Section 2254 Cases provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

This rule is a codification of the principles announced in Sanders. This Court said controlling weight should be given to

a prior denial of habeas relief where the same grounds were presented and determined on the merits in a prior application, and the ends of justice would not be served by reaching the merits of the new petition.

Respondent in his motion to recall the mandate which had issued on appeal from the denial of the first federal habeas petition conceded, "All of the legal components and all of the factual basis of the claim have been presented." The district court proceeded to analyze respondent's second petition with Sanders and its progeny in mind. That court made findings of fact which supported its conclusions that the second habeas petition was successive and the ends of justice did not require a redetermination of the issues. See Songer v. Wainwright, 605 F.Supp. 686 (M.D. Fla. 1985).

This Court in Pullman-Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982) indicated the standard to be applied by a court of appeals to findings of fact by the district court is the clearly erroneous standard. The district court findings should not be set aside unless clearly erroneous. Accord, Rule 52(a), Federal Rules of Civil Procedure. Yet, the 11th Circuit in this case completely overlooked these findings. The court set aside the district court findings without explaining why they were clearly erroneous.

The circuit court's assertion that the second petition raises a different ground for relief is belied by the record. At most what the second petition contains is additional facts on the same issues. Even under such a set of circumstances,

the 11th Circuit has held that defendants are not entitled to relitigate their claims. See e.g., Shriner v. Wainwright, 735 F.2d 1236, 1239 (11th Cir. 1984) and Smith v. Kemp, 715 F.2d 1459, 1468 (11th Cir. 1983). Thus, the lower court has not only failed to consider the precedent of this Court but also its own precedents.

In both Woodard v. Hutchins, __ U.S. __, 104 S.Ct. __, 78 L.Ed.2d 541 (1984) and Barefoot v. Estelle, __ U.S. __, 103 S.Ct. __, 77 L.Ed.2d 1090 (1983), this Court recognized the problems associated with successive petitions. This court also indicated the federal courts should not tolerate repetitious petitions in response to the setting of execution dates in death cases. It has become a standard procedure in the death penalty area to file a successive habeas petition on any "new" issue

pending in the federal courts.

But the problems inherent in successive petitions are not unique and troublesome in the death area only. Recently, the Second Circuit addressed a successive petition which did not involve the death penalty. Wilson v. Henderson, 742 F.2d 741 (2d Cir. 1984). The circuit court in Wilson granted relief on a successive petition. The state sought certiorari relief on the questions, inter alia, of finality of litigation and successive habeas petitions. On June 24, 1985 certiorari review was granted by this Court. See Henderson v. Wilson, 87 L.Ed.2d 630 (1985).

Petitioner respectfully submits certiorari review should be granted in this case to lend guidance to the lower federal courts on the proper application of Rule 9(b) and Sanders v. United States, supra,

in death cases. The second federal habeas petition has become the norm in death litigation. See e.g., Ford v. Strickland, 734 F.2d 538 (11th Cir. 1984) and Adams v. Wainwright, 734 F.2d 511 (11th Cir. 1984).

The state courts, and the federal district courts in the eleventh circuit are as perplexed as the lay citizenry. When will litigation in any case be considered final? When and under what circumstances will the federal appeals court apply the doctrines of successive petition or abuse of the writ? Is it now the law that a state prisoner may seek habeas relief on the same issue until he reaches a sympathetic ear?

B.

THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS (EN BANC) IN THE INSTANT CASE HOLDING THAT RESPONDENT SHOULD RECEIVE A NEW SENTENCING HEARING DUE TO THE TRIAL JUDGE'S ALLEGED FAILURE TO CONSIDER NON-STATUTORY MITIGATING EVIDENCE CONFLICTS DIRECTLY WITH FAYERWEATHER V. RITCH, 195 U.S. 276, 25 S.Ct. 58, 49 L.Ed. 193 (1904) AND IS BASED ON AN ERRONEOUS FACTUAL PREMISE.

In Washington v. Strickland, 693 F.2d 1243 (11th Cir. 1983), reversed on other grounds, __ U.S. __, 104 S.Ct. __, 80 L.Ed.2d 674 (1984) the Eleventh Circuit Court of Appeals held:

> "It is a firmly established rule in our jurisprudence that a judge may not be asked to testify about his mental processes in reaching a judicial decision . . .
>
> There are several strong policy reasons that counsel continued adherence to this rule. First, such testimony poses special risks of inaccuracy. The testimony is often given several years after the fact and a judge is unlikely to be able to reconstruct his thought processes accurately over such a span of

> time. Second, the finality and integrity of judgments would be threatened by a rule that enabled parties to attack a judgment by probing the mental processes of a judge." Id. at 1263.

Accord: Proffitt v. Wainwright, 685 F.2d 1227, 1255 (11th Cir. 1982) cert. den. __ U.S. __, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983); United States v. Crouch, 566 F.2d 1311 (5th Cir. 1978).

Notwithstanding the foregoing "firmly established rule," the Eleventh Circuit, sitting en banc in the case at bar, has granted habeas corpus relief based on statements of the trial judge made in a state collateral proceeding eleven years after respondent's trial.

This Court in Fayerweather v. Ritch, 195 U.S. 276, 25 S.Ct. 58, 49 L.Ed. 193 (1904) declared:

> A judgment is a solemn record. Parties have a right to rely upon it. It should not lightly be disturbed and ought never to be overthrown or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision.
>
> Id. at 49 L.Ed. 213

The action of the Eleventh Circuit in the instant case flies directly in the fact of Fayerweather. It is noteworthy that the Court of Appeals was more than willing to apply Fayerweather to exclude judicial testimomony which the state sought to offer in Proffitt and Strickland to support the state judgment and sentence. Now, when the judicial evidence in question arguably casts doubt on the validity of the sentence, the Court of Appeals has chosen to rely on it.

The comments of the trial judge, John W. Booth, are appended to this petition at A 254 - 256. Petitioner would urge this

Court to examine them closely, as contrary to the Court of Appeals opinion, the trial judge does not state that he failed to consider non-statutory mitigating evidence when sentencing Songer. In fact, at Songer's re-sentencing following the Gardner remand, the trial judge made it abundantly clear that he had considered the entire record.
(A 229, 248) Further, where, as here, the record does not reflect the standard applied by the trial judge, he is presumed to have applied the correct one. See e.g., Wainwright v. Witt, 469 U.S. __, 105 S.Ct. ____, 83 L.Ed.2d 841 (1985). The Court of Appeals must not be permitted to bend the record facts to suit its own purposes.

More importantly, regardless of the trial court's interpretation of the statute, this matter has been fully reviewed

by the Florida Supreme Court. One must assume that the Florida Supreme Court, in performing its function of reviewing the entire record, properly applied Florida's death penalty statute and considered all mitigating evidence.[1] This Court was confronted with a similar situation in Wainwright v. Goode, __ U.S. __, 104 S.Ct. __, 78 L.Ed.2d 187 (1983) and held:

> Whatever may have been true of the sentencing judge, there is no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered Goode's future dangerousness. Consequently, there is no scund basis for concluding that the procedures followed by the State produced an arbitrary or freakish sentence forbidden by the Eighth Amendment.

Id. at 78 L.Ed.2d 194.

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[1] It is important to recall that no mitigating evidence was excluded by the trial court at Songer's sentencing hearing.

See also Barclay v. Florida, __ U.S. __, 103 S.Ct. __, 77 L.Ed.2d 1134 (1983).

If the appellate process is to have any meaning to the bar and the public, there must be confidence that the court of appeals will consistently apply its own precedents and those of this Court. This Court should grant certiorari and resolve the confusion created by the Eleventh Circuit's refusal to follow not only Fayerweather and Goode, but its own cases, Proffitt and Washington.

CONCLUSION

The decision of the Eleventh Circuit in this case clearly ignores this Court's rulings in both Fayerweather v. Ritch, supra, and Sanders v. United States, supra; therefore, certiorari review should be granted and the decision of the 11th Circuit should be summarily reversed with instructions to reinstate the opinion of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, PEGGY A. QUINCE, Counsel for Petitioner, and a member of the Bar of the United States Supreme Court, hereby certify that on 21st day of October 1985, I served three copies of the Petition for Writ of Certiorari on Deval L. Patrick, 99 Hudson Street, New York, New York 10013, by a duly addressed envelope with postage prepaid.

Peggy A. Quince
Assistant Attorney General